

The Appeals Board reviewed and considered the record listed in the Award and adopted the stipulations listed in the Award.

ISSUES

Claimant Larry J. Matney, a chiropractor, worked as an employee of Matney Chiropractic Clinic. Claimant was also the sole owner and president of respondent, Matney Chiropractic Clinic. The Administrative Law Judge awarded claimant benefits based on a 38.75 percent work disability. The Award also allows Larry Matney, as respondent, to designate the treating physician over the insurance carrier's objection. On appeal, the respondent now asks the Appeals Board to address the following issues:

- (1) Whether claimant's award should be limited to functional impairment only.
- (2) Whether claimant is entitled to any permanent partial disability benefits when the injury did not disable the claimant for at least one full week. See Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, rev. denied 260 Kan. ____ (1996).
- (3) Whether the treatment by Darrell E. Fore, D.C., is unauthorized and such as that reimbursement is therefore limited to \$350.
- (4) Whether the insurance carrier has the right to designate the authorized treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

- (1) Should claimant's award be limited to the functional impairment because claimant continued to work at a comparable wage after his injury?

For reasons explained below, this issue has been, in effect, preempted by the second listed issue. However, whether claimant continued to earn a comparable wage must be determined as that question also impacts the second issue.

The evidence establishes that at the time of claimant's injury claimant was the sole owner and president of the respondent corporation. He also worked as an employee providing chiropractic care for patients of the clinic. He paid himself a draw of \$4,000 twice monthly. The evidence also establishes that after the injury claimant saw fewer patients, but he continued to draw \$4,000 twice monthly. In January of the following year he increased the draw to \$4,500 twice monthly.

The Appeals Board agrees that claimant continued to earn a comparable wage. The pre-injury average weekly wage was based upon the claimant's draw. The post-injury wage should be similarly based upon claimant's draw. This approach is supported by the Court of Appeals decision in Thompson v. Harold Thompson Trucking, 12 Kan. App. 2d 449, 748 P.2d 430 (1987).

(2) Should claimant be denied permanent partial general disability benefits on the basis of Boucher?

In the Boucher decision, the Kansas Court of Appeals held that a claimant is not entitled to permanent partial disability benefits if the injury did not disable him/her for a period of at least one week from earning full wages. After the Boucher decision, the legislature enacted Senate Bill No. 649, an amendment to K.S.A. 44-501(c). Senate Bill No. 649 allows a claimant to recover for permanent disability even if not disabled for a full week and specifically provides that it is to be applied retroactively to all cases not fully adjudicated at the time of its enactment. Counsel for the respondent and its insurance carrier contend that the amendment is unconstitutional.

After arguments were presented in this case, the Kansas Court of Appeals issued its decision on Osborn v. Electric Corporation of Kansas City, ___ Kan App. 2d ___, 936 P.2d 297 (1997). In the Osborn case, the Court of Appeals found retroactive application of the amended K.S.A. 1996 Supp. 44-501(c) (Senate Bill No. 649) to be an unconstitutional violation of due process. Appellee, the claimant in the workers compensation case, filed a petition for review by the Kansas Supreme Court. The petition for review was denied by the Kansas Supreme Court on July 10, 1997. The Osborn decision is, therefore, binding law.

Respondent contends claimant was not disabled for "a period of at least one week from earning full wages." Claimant disagrees and points to the fact that he, at some time after the injury, stopped seeing as many patients, and he did so because of the injury. Respondent, on the other hand, cites the fact that claimant did not stop seeing patients and did not stop receiving full wages. Consistent with the Appeals Board's ruling on claimant's post-injury wage, the Appeals Board agrees with respondent's position on this issue. Claimant was not disabled from earning his regular wage for one week. Claimant is, therefore, limited to only medical benefits in accordance with K.S.A. 44-501(c).

(3)(4) Should the treatment by Darrell E. Fore, D.C., be treated as unauthorized and reimbursement be limited to \$350? Does the insurance carrier have the right to designate the authorized treating physician?

The above two issues were separately identified in the Request for Board Review. However, both involve the same question. Does respondent, under the circumstances presented here, have the authority to designate his own treating physician, or does that right belong to the insurance carrier? The Appeals Board finds that, under these limited

circumstances, the right to designate the health care provider should be the right of the insurance carrier.

Respondent points to the language of K.S.A. 44-5a08 which states that the insurance carrier is subrogated to the rights and privileges of the employer. Review of the Act shows that this specific statute applies to occupational disease claims. However, K.S.A.1996 Supp 44-532 contains similar language applicable to accidental injury claims. That statute provides:

"Where the payment of compensation of the employee or the employee's dependents is insured by a policy or policies, at the expense of the employer, . . . the insurer . . . shall be subrogated to the rights and duties under the workers compensation act of the employer so far as appropriate" (Emphasis added.)

Where the employer and employee are the same individual, potential conflicts of interest arise. In this case, Dr. Matney designated as his authorized health care provider a chiropractor who had treated him for a number of years. He has also designated the same chiropractor as his authorized treating physician for future medical care. The Appeals Board concludes that, under this unique set of circumstances, it is "appropriate" that the insurance carrier have the right to designate the authorized treating physician. Claimant will, of course, retain the rights granted claimant under the Act in the event the medical care is unsatisfactory.

In this case, Dr. Fore was approved by the authorized treating physician, Kenneth L. Wertzberger, M.D., up to a certain date. The insurance carrier paid Dr. Fore's statement for medical care from July 22, 1993, to September 9, 1994. The insurance carrier then notified claimant by phone on November 24, 1993, and by letter December 3, 1993, that Dr. Wertzberger was to be the only authorized treating physician. Claimant was then again informed by phone June 6, 1994, and by letter June 22, 1994, that Dr. Fore was no longer an authorized treating physician. Claimant received an additional notice from the insurance carrier denying authorization for treatment after September 9, 1994. Accordingly, the Appeals Board concludes that respondent's insurance carrier should not be responsible for treatment by Dr. Fore after September 9, 1994, except as an unauthorized medical expense. In addition, future medical treatment, if any, should be approved by the physician designated by the insurance carrier.

AWARD

WHEREFORE, the Appeals Board concludes that the Award by Administrative Law Judge Alvin E. Witwer, dated October 22, 1996, should be modified.

Claimant's application for permanent partial disability benefits is denied.

Claimant is awarded medical expenses previously paid.

Claimant is further awarded expenses or cost of medical care provided by Dr. Fore through September 9, 1994, and denied cost of care by Dr. Fore after September 9, 1994.

Claimant is awarded future medical care to be provided by a physician designated by respondent's insurance carrier.

Claimant is awarded \$350 in unauthorized medical expenses upon proper presentation to the insurance carrier of medical bills for such unauthorized care.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge not inconsistent with the above specific orders by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
Rex W. Henoch, Lenexa, KS
Administrative Law Judge, Overland Park, KS
Philip S. Harness, Director